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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-295

ALBERT SIMON, INC., and SEABOARD NEW YORK CORPORATION,

Appellants.

-against-

BESS MYERSON, as Commissioner of the Department of Consumer Affairs of the City of New York,

Appellee.

MOTION TO DISMISS

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MOTION TO DISMISS

Appellee moves to dismiss the appeal herein for lack of jurisdiction on the ground that it presents no substantial federal question.

ARGUMENT

THE APPEAL SHOULD BE DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION. THE LOCAL LEGISLATIVE BODY HAS FOUND THAT CERTAIN KINDS OF COIN-OPERATED DEVICES, NAMELY PINBALL MACHINES AND GAMES OF CHANCE, ARE WIDELY USED IN COMMERCIAL ESTBLISHMENTS AS A MEANS OF GAMBLING. THE NEW YORK COURT OF APPEALS UNANIMOUSLY DECIDED THAT A PROHIBITION ON LICENSING SUCH MACHINES FOR COMMERCIALUSE DOES NOT VIOLATE DUE PROCESS. THAT DECISION WAS CORRECT AND ENTIRELY IN ACCORD WITH THE DECISIONS OF THIS COURT.

The appellants assert that the decision of the New York Court of Appeals here appealed from "stands for the bold proposition that municipal police power in the gambling field is virtually limitless" and that a ban can be placed on "anything" a City Council "views with displeasure" (Juris. Stat., p. 8). But a reading of the opinion of the New York Court of Appeals makes clear that that is not so. The Court carefully reviewed the legislative findings in support of the ban and applied the proper

rules of law in evaluating the significance of those findings (Juris. Stat., pp. 2a-3a). As stated by the Court (3a):

> "The legislation adopted by the municipality is required to be reasonably related to a proper governmental purpose, here the prevention of evils associated with gambling. To reinforce the presumption that the regulation is valid (Nettleton v. Diamond, 27 N Y 2d 182, 193) we have an expressed legislative judgment that there is a strong relationship between gambling and the evils that attend it, on the one hand, and pinball machines, on the other. We cannot say this judgment is irrational. It would not matter whether the courts thought the legislation unwise, or that its purpose could better be achieved in another way, or that the method chosen was ineffective. So long as it has a rational basis, the choice of the particular course to be taken was for the legislature."

This conclusion was entirely correct. The appellants' assertion that the games are intended for innocent amusement is not to the point and does not negate the pertinent legislative findings. The local legislation is specifically aimed, not at devices in which gambling is inherent such as devices which offer prizes, but

at devices, like those at issue here, where the score obtained is dependent upon chance and which, the local legislature found, are used by the public as a means of gambling. That the machines themselves do not offer prizes and that the intent of an individual distributor is innocent does not alter the susceptibility of such games of chance to be used in a manner harmful to the public welfare.

The appellants failed to establish any basis for overturning the local legislature's findings as to the existence and dangers of such use. However, they claim that their machines cannot be prohibited commercially just because two players or a player and a proprietor might bet on the outcome (Juris. Stat., p. 10).

In holding that the ordinance "does not violate due process", the Court of Appeals noted the well-established principle that its validity "does not depend upon a showing that every pin-

ball machine will in fact be used for an improper purpose (Cf., Grossman v. Baumgartner, 17 N Y 2d 345, 359)" (Juris. Stat., p. 3a). To similar effect see: Ferguson v. Skrupa, 375 U.S. 726 (1963); Olsen v. Nebraska, 313 U.S. 236 (1941). Moreover, as already discussed, here there were legislative findings that the kind of machine at issue is not only susceptible of use for gambling but is in fact widely used for gambling. The appellants' reference to coins as susceptible to use for gambling does not avail them. For a variety of reasons too obvious to list, coins are not barred by local law even though they too can be used for gambling. This in no way establishes that the prohibition of the machines involved here is invalid. The appellant cites no case and presents no logic to suggest otherwise.

Also, as noted by the Court of Appeals (Juris. Stat., p. 3a), "hardship to the

particular petitioner cannot overcome the reasonably presumed public benefit of an otherwise valid ordinance" [citing Town of Hempstead v. Goldblatt, 9 N Y 2d 101, 105 (1961), affd. 369 U.S. 590 (1962)].

In other jurisdictions, ordinances expressly prohibiting the licensing or operation of all pinball machines or similar devices have consistently been upheld as reasonable exercises of the police power to protect morals and general welfare, even where there is no showing that the prohibited machines are actually used for gambling; and, where review has been sought in this Court, it has been denied. See, e.g., Benjamin v. City of Columbus, 167 Ohio St. 103, 146 N.E. 2d 854 (1957), cert. den. 357 U.S. 904 (1958); Terry v. City of Portland, 204 Or. 478, 269 P. 2d 544 (1954), app. dism. for want of a substantial federal question, 348 U.S. 979 (1954); Ex parte Lawrence, 55 Cal.

App. 2d 492, 131 P. 2d 27 (1942); Woodward v. City of Lithonia, 191 Ga. 234, 11 S.E. 2d 476 (1940); Berman v. Prendergast, 338 Ill. App. 580, 88 N.E. 2d 374 (1949). The only case which the appellants cite to the contrary is Cossack v. City of Los Angeles, 114 Cal. Rptr. 460, 523 P. 2d 260 (1974), but an examination of the opinion in that case makes clear that it is entirely consiatent with the general rule just stated. The issue in Cossack was whether particular pinball-type machines were games of skill and the trial court's conclusion, on the facts before it, that they were, was upheld. The ordinance at issue was held to apply only to games of chance and State law preempted that field. Here, in contrast, there was an administrative hearing at which the appellants had full opportunity to prove that their machines were not games of chance. As found by the New York Court of Appeals, the determination that they

were games of chance "was supported by substantial evidence" (Juris. Stat., p. 4a). It may also be noted that in Cossack, the Court referred, without any sign of disapproval, to the fact that games of chance are clearly prohibited by the State. 523 P. 2d at p. 264.

CONCLUSION

The appeal should be dismissed for want of a substantial federal question, with costs.

September 24, 1975.

Respectfully submitted,

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